

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs-Appellants,

vs.

MARY V. KING, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE MARTIN J. JENKINS, JUDGE PRESIDING
(CASE No. CV-99-4389-MJJ)

**SUPPLEMENTAL BRIEF OF *AMICI CURIAE* LEGAL COMMUNITY AGAINST
VIOLENCE, CITY OF OAKLAND, CITY AND COUNTY OF SAN FRANCISCO,
BRADY CENTER TO PREVENT GUN VIOLENCE, CALIFORNIA PEACE
OFFICERS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION,
CALIFORNIA STATE SHERIFFS' ASSOCIATION, COALITION TO STOP GUN
VIOLENCE, VIOLENCE POLICY CENTER, AND YOUTH ALIVE!, IN
SUPPORT OF DEFENDANTS-APPELLEES
URGING AFFIRMANCE OF THE JUDGMENT**

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INTRODUCTION

In 1999, Alameda County passed an ordinance restricting possession of firearms on County-owned property, in response to widespread gun violence in the County — including 879 homicides during the early 1990s and a shooting on County fairgrounds on July 4, 1998. Plaintiff-Appellant Nordyke, who asserts that the Ordinance prevents him from operating profitable gun shows on the County fairgrounds, has sued to invalidate the Ordinance, and claims a Second Amendment right to possess and sell guns on County property.

Nordyke’s claim should be rejected on numerous grounds. First, the County’s Ordinance is not subject to the Second Amendment. Ninth Circuit and Supreme Court precedent holds, and *Heller* acknowledges, that the Second Amendment has not been incorporated by the Fourteenth Amendment and therefore does not apply to state and local regulation. Second, and apart from incorporation, the scope of the right *Heller* describes does not extend to Nordyke’s activities. *Heller* recognizes an individual right for “law-abiding, responsible citizens to use arms in defense of hearth and home.” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008). It does not recognize a right to profit commercially by selling guns on County-owned property. Indeed, *Heller* itself states that laws such as the Ordinance are “presumptively lawful.” *Id.* at 2816-17.

Even if the Second Amendment applied, the Ordinance would still be valid. The Ordinance is a reasonable regulation that addresses the County's undisputed interest in protecting its citizens on County-owned property, as well as in managing its own property. The Ordinance makes firearm possession on County-owned property only a misdemeanor, and does not preclude purchase of guns from the 29 gun retailers in the County or outside the County, transportation of guns on County roads, gun shows on non-County property, or events (including gun shows) that comply with the County's guidelines. The Ordinance also contains numerous exemptions. In short, the Ordinance does nothing to restrict any individual's core constitutional right to keep guns for self-defense in the home.

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amici curiae are the City of Oakland, California, and the City and County of San Francisco, California; and the non-profit organizations Legal Community Against Violence, Brady Center To Prevent Gun Violence, California Peace Officers' Association, California Police Chiefs' Association, California State Sheriffs' Association, Coalition To Stop Gun Violence, Violence Policy Center, and Youth Alive! Each *amicus* is actively engaged in efforts to reduce the costs that gun violence inflicts upon local, and especially urban, communities. The Statement of Interest of each *amicus* is included in Attachment A.

RELEVANT PROCEDURAL HISTORY

Alameda County passed an ordinance restricting firearm possession on County-owned property in August 1999. In September 1999, Nordyke filed this action.¹ The procedural history since that time is described in the County's Answering Brief dated January 8, 2008 on pages two to ten.

This brief relates to the parties' supplemental briefing on Nordyke's appeal from the district court's March 31, 2007 grant of summary judgment in favor of Alameda County. See Order Granting Def. Mot. for Summ. J., *Nordyke v. King*, No. C99-04398 (N.D. Cal. Mar. 31, 2007). After the parties had completed their briefing on that appeal, the United States Supreme Court decided *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). In light of that decision, on July 28, 2008, this Court granted the parties' Motion for Leave to File Supplemental Briefing on the Second Amendment.

¹ Plaintiffs-Appellants are gun show operators Russell Allen Nordyke and Sallie Ann Nordyke, doing business as TS Trade Shows, and other promoters, exhibitors, and patrons of gun shows. (Supplemental Brief of Appellants Re: Second Amendment Issues ("Pl. Supp. Br.") at 6.) Plaintiffs Appellants' Supplemental Brief, however, focuses its Second Amendment analysis on gun show operators at the Alameda County Fairgrounds. (See Pl. Supp. Br. 48-49, 51.) This brief refers to Plaintiffs-Appellants simply as "Nordyke."

ARGUMENT

I. THE SECOND AMENDMENT DOES NOT APPLY TO THE ORDINANCE OR TO NORDYKE’S COMMERCIAL SALE OF GUNS

A. The Second Amendment Is Not Incorporated Against The States Or Local Governments

The Ninth Circuit has already decided the threshold issue in this case: that the Second Amendment is not incorporated by the Fourteenth Amendment against the states or local governments. *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 731 (9th Cir. 1992); *see also Nordyke v. King*, 319 F.3d 1185, 1193 (9th Cir. 2003) (Gould, J., specially concurring) (discussing *Fresno*, 965 F.2d at 731). In *Fresno*, this Court confirmed that until the Supreme Court’s previous decisions in *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), and *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886), are overturned, the Second Amendment applies only to the federal government. *Fresno*, 965 F.2d at 731.

Heller does not purport to change the law on incorporation. 128 S. Ct. at 2813; *id.* at n.23. The Court expressly notes that it was not considering *Cruikshank*’s “continuing validity on incorporation,” as that question was not presented. *Id.* at 2813 n.23. The Court explains that states are “free to restrict or protect [Second Amendment rights] under their police powers.” 128 S. Ct. at 2813, citing *Cruikshank*, 92 U.S. at 552. In *Cruikshank*, the Supreme Court had held that police powers are “not surrendered or restrained by the Constitution”

Cruikshank, 92 U.S. at 552 (internal citations omitted). Accordingly, the Ninth Circuit’s consistent rulings that the Second Amendment does not apply to local regulation continue to govern here.

B. *Heller* Recognizes The Right To Possess Guns For Self-defense In The Home — Not The Right To Profit From The Commercial Sale Of Guns

Even if the Second Amendment applied generally to the states and local governments, it would not protect the rights that Nordyke’s action asserts. *Heller*’s holding is limited to the question of whether a “prohibition on the possession of usable handguns *in the home* violates the Second Amendment to the Constitution.” 128 S. Ct. at 2787-88 (emphasis added). The statute at issue in *Heller* made it a crime for residents to possess handguns or to keep lawfully owned firearms in their homes unless the firearms were “unloaded and disassembled or bound by a trigger lock,” which rendered them inoperable. 128 S. Ct. at 2788. *Heller* holds that the Second Amendment provides “law-abiding, responsible citizens” an individual right “to use arms in defense of hearth and home.” *Id.* at 2821. *Heller* found the District of Columbia law unconstitutional because it made it “impossible” for gun owners to use their guns for what the Court holds is their “core lawful purpose”—self-defense. *Id.* at 2818. In doing so, the Court limits its holding to “the right to keep and bear arms for defense of the home.” *See, e.g., id.* at 2819, 2821.

Courts around the country interpreting *Heller* agree that it applies to the defense of “hearth and home” and no further. *See United States v. Fincher*, 538 F.3d 868, at *9 (8th Cir. 2008) (*Heller* holds that the “complete prohibition on the possession of usable handguns in one’s home violated the Second Amendment . . . [but] the Court also stated that the right to possess firearms is not beyond the reach of all government regulation.”); *United States v. Dorosan*, No. 08-042, 2008 U.S. Dist. LEXIS 49628, at *18 (E.D. La. June 30, 2008) (holding that a law banning handgun possession in a post office parking lot does not implicate *Heller*); *United States v. Kilgore*, No. 08-66, 2008 U.S. Dist. LEXIS 69393, at *1 (W.D. Wis. Aug. 26, 2008) (*Heller* holds “only that the District of Columbia cannot constitutionally ban handgun possession in the home for use in self-defense by persons not otherwise prohibited from gun possession.”); *United States v. Lepage*, No. 18-363, 2008 U.S. Dist. LEXIS 69395, at *3 (W.D. Wis. Aug. 26, 2008) (same).

In contrast, Nordyke has not alleged that the Ordinance has any impact on the right to self-defense in the home. (*See* Pl. Supp. Br. 47 (limiting Second Amendment claim to “their activities at gun shows at the Alameda County Fairgrounds”.) Nor could he. As local law precludes the County from owning residential property, no one resides on County-owned property. (*See* Def. Supp. Br. at 1.) The Ordinance therefore does not directly restrict any individual’s right

to keep and bear arms for self-defense in the home. Moreover, the Ordinance does not even indirectly affect the Second Amendment rights *Heller* recognizes, as County residents have extensive opportunities to purchase guns throughout the state, including from the 29 gun dealers licensed in the County. (Attachment B., Nov. 2007 Bureau of Alcohol, Tobacco, Firearms and Explosives report.) To the extent a person purchasing guns transports them using the County's roads, the Ordinance permits it. (Alameda County Code § 9.12.120.F.5.)

Instead, Nordyke argues that the Ordinance violates his alleged Second Amendment right to sell guns at gun shows on County-owned property. (Pl. Supp. Br. at 49.) *Heller* does not support that argument. Indeed, *Heller* expressly states that similar regulations are valid. Rather than restricting its holding to the issue of the case—the possession of firearms in the home—the Court adds that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions.” 128 S. Ct. at 2816-17. In describing those prohibitions, the Court lists as examples “laws forbidding the carrying of firearms in sensitive places such as . . . government buildings” and “laws imposing conditions and qualifications on the commercial sale of firearms.” *Id.* These are the very prohibitions at issue in this case.

Nordyke claims that the Ordinance regulates his *commercial* sale of arms, and his gun shows were held in *government buildings*, on the fairgrounds. *Heller* therefore does not apply to Nordyke's action.

II. EVEN IF THE SECOND AMENDMENT WERE APPLICABLE, THE ORDINANCE IS CONSTITUTIONAL

A. The Ordinance Is Presumptively Lawful Under *Heller* And Valid As A Reasonable Regulation

Assuming that the Second Amendment applies to Nordyke's sale of guns on County land (though it does not), the next issue would be what standard of review the Court should use in evaluating the Ordinance. *Heller* states that the standard of review would not be "rational basis," but it expressly declines to decide what standard should apply. *Id.* at 2817 n.27. "Strict scrutiny," advocated by Nordyke, would be inconsistent with *Heller* and Ninth Circuit precedent. Instead, this Court should apply the "reasonable regulation" standard used by the state and federal courts that have previously recognized an individual right to bear arms.

Heller describes a "presumption of constitutionality" that would apply to statutes similar to the Ordinance here. Specifically, the Court states that prohibitions of firearms in government buildings and the regulation of commercial sales of guns are presumptively lawful. *Id.* at 2816-17. The presumption of legality adopted by the Court is at odds with strict scrutiny, which presumes *against* a law's constitutionality. *See, e.g., Crawford v. Lungren*, 96 F.3d 380, 385 (9th Cir. 1996); *City of L.A. v. Alameda Books*, 535 U.S. 425, 434 (U.S. 2002).

Nevertheless, Nordyke argues that the standard of review should be strict scrutiny, insisting that the right to sell guns on County land is a fundamental right.

(Pl. Supp. Br. at 51-52.) As discussed above, the buying and selling of guns at the County fairgrounds is a commercial activity that falls squarely into the categories *Heller* states are presumptively lawful. There is no reason to overcome the presumption here. The Ordinance does not touch, directly or indirectly, upon Plaintiffs' right to keep and bear arms for self-defense in their homes.

But even if the facts of the present case fell outside *Heller*'s presumptively lawful categories, which they do not, Nordyke would be incorrect. *Heller* does not reverse the Ninth Circuit's holding that "[t]he right to bear arms . . . is not the type of fundamental right to which the 'compelling state interest' standard applies."

Marchese v. California, 545 F.2d 645, 647 (9th Cir. 1976) (citations omitted).

There is therefore no basis to apply strict scrutiny in this case.

Indeed, the pre-*Heller* courts that have recognized an individual right to bear arms have applied a "reasonable regulation" standard. For example, the Fifth Circuit held that the right is subject to "reasonable" restrictions if the restrictions are "not inconsistent with the right . . . to individually keep and bear . . . private arms." *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001); *see also United States v. Graham*, 305 F.3d 1094, 1106 (10th Cir. 2002) ("Second Amendment rights are subject to *reasonable* government restrictions.") (emphasis in original). This Court has also shown support for a reasonable regulation standard, recommending in an earlier ruling on this case that it should recognize an

individual right to bear arms, “subject to reasonable restriction by the government.” *Nordyke*, 319 F.3d at 1193 (Gould, J., specially concurring).

Similarly, state courts have historically applied a “reasonable regulation” standard under state constitutions that provide a right to bear arms.² For example, in *Mosby v. Devine*, the Supreme Court of Rhode Island affirmed the denial of a permit to carry a concealed weapon to a gun collector who could not show a sufficient need. The court recognized an individual right to bear arms under the state constitution, but also found that the licensing scheme was a reasonable regulation that was within the state’s police powers. 851 A.2d 1031, 1035, 1044-45 (R.I. 2004). Similarly, in *Bristow v. State*, the Alabama Court of Criminal Appeals affirmed a decision upholding a law that prohibited criminals from possessing guns. The court held that “[i]t is well within the power of the Legislature to deal with the constitutional right to bear arms in defense of himself, and it is subject to reasonable regulation by the State under its police power.” 418 So.2d 927, 930 (Ala. Crim. App. 1982); *see also State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 146-47 (W. Va. 1988) (“courts throughout the country

² The Court in *Heller* looked to state court firearm decisions for guidance, as the right of individuals to bear arms under certain state constitutions is long established. *See, e.g., Heller*, 128 S. Ct. at 2816-17. It is appropriate for this Court to do the same. *Nordyke* concedes that the states’ treatment of the right to bear arms is relevant to the consideration of this law. (Pl. Supp. Br. at 41.)

have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly held the police power of the state through its legislature to impose reasonable regulatory control . . . to promote the safety and welfare of its citizens”); *State v. Angelo*, 130 A. 458, 459 (N.J. 1925); *Bleiler v. Chief, Dover Police Dep’t*, 155 N.H. 693, 699-700 (2007); (App. L to Def. Supp. Br. and discussion in Def. Supp. Br. at 51-56).

The “reasonable regulation” standard of review involves a determination of whether legislation affecting the right to bear arms reasonably promotes the welfare and the safety of the people. *Arnold v. Cleveland*, 67 Ohio St.3d 35, 47-48 (1993). Under the test, a regulation of the right to bear arms will be upheld if it is “fair, proper, moderate, suitable under the circumstances and not excessive.” *Id.* at 48. The regulation will not be valid, however, if it makes the right to bear arms illusory. *Colorado v. Blue*, 190 Colo. 95, 103 (1975) (“the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections”).

A reasonable regulation standard is stricter than rational basis review. Under “rational basis review, the Court determines whether governmental action is so arbitrary that a rational basis for the action cannot even be conceived *post hoc*.” *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). In contrast, the reasonable regulation test assesses whether a law furthers a legitimate state

interest, rather than merely “whether any conceivable rationale exists,” and it does not allow a law to render a right illusory. *Bleiler*, 155 N.H. at 700; *Wisconsin v. Cole*, 264 Wis.2d 520, 540 (Wis. 2003).

The Ninth Circuit has recognized that a test that involves consideration of whether the law furthers a legitimate state interest is a higher standard of review than rational basis. *Witt*, 527 F.3d at 817. This Court held that the review standard adopted in *Lawrence v. Texas*, 539 U.S. 558 (2003), was more stringent than traditional rational basis review because it required consideration of whether the law “furthered a legitimate state interest.” *Witt*, 527 F.3d at 817.

Further, while the *Heller* majority rejected Justice Breyer’s proposed interest-balancing test on the grounds that it would make the right to bear arms illusory, *id.* at 2821, the reasonable regulation standard does not pose that problem. By definition, a regulation is not reasonable if it renders the right illusory. *See Cole*, 264 Wis.2d at 540; *Blue*, 190 Colo. at 103.

B. *Heller* Does Not Limit The County’s Right To Manage Its Own Property

In addition to the obligation to protect public safety by exercising their police power, discussed above, it is especially important that localities retain the right to manage their own property. California law recognizes the right of each county to “manage . . . its property as the interests of its inhabitants require.” Cal. Gov. Code § 23004(d). Counties maintain “substantial authority to manage [their]

property, including the most fundamental decision as to how the property will be used.” *Nordyke v. King*, 27 Cal. 4th 875, 882 (2002). For that reason, the California Supreme Court has consistently held that a county should not be required to “grant access to its property to all comers,” including gun shows. *Great Western States, Inc. v. County of Los Angeles*, 27 Cal. 4th 853, 864, 867, 870 (2002); *Nordyke*, 27 Cal. 4th at 875.

Courts have long recognized that the federal government has the constitutional right, and indeed the duty, to “maintain safety and order on government property.” *United States v. Dorosan*, No. 08-042, 2008 U.S. Dist. LEXIS 49628, at *15 (E.D. La. June 30, 2008) (quoting *United States v. Gliatta*, 580 F.2d 156, 160 (5th Cir. 1978)). As explained above, Alameda County possesses the same right and duty under state law. *See* Cal. Const., art. XI, § 7; Cal. Gov’t Code § 23004(d). *Heller* does not change that. *See Dorosan*, 2008 U.S. Dist. LEXIS 49628, at *14-16 (holding that *Heller* does not apply to ban on “possession of ‘arms’ on *federal property*”) (emphasis in original). Indeed, *Heller* specifically recognizes the sensitive nature of local government-owned property. 128 S. Ct. at 2816-17. Thus, there is no basis now to limit the County’s longstanding right to manage County-owned property for the public good.

III. ALAMEDA COUNTY’S ORDINANCE SATISFIES LONG-STANDING STANDARDS FOR FIREARM REGULATION

A. Possession Of Firearms In Public Places Has Been The Subject Of Longstanding Prohibitions

Heller makes clear that it does not intend to cast doubt on “longstanding prohibitions on the possession of firearms,” noting that they are “presumptively lawful regulatory measures.” 128 S. Ct. at 2816-17. As discussed in section II.A, above, the Ordinance is constitutional as applied to Nordyke because, *inter alia*, it falls within *Heller*’s specifically enumerated categories of presumptively lawful measures. In addition, the possession of firearms in public places is another example of a longstanding prohibition. *See Burton v. Sills*, 53 N.J. 86, 99-100 (1968) (noting that weapons have been regulated since the Statute of Northampton in 1328 and that *longstanding decisions* under “State Constitutions show the upholding of regulations prohibiting the carrying of concealed weapons, prohibiting persons from going armed in certain *public places* and other restrictions, in the nature of police regulations” (emphasis added)). Specific examples of prohibitions on possession of guns in public places (a broader category than county-owned land) include the following:

- Georgia Code § 16-11-127 has prohibited the carrying of firearms, knives, or explosive compounds at public gatherings since 1870. Ga. Code Ann. § 16-11-127.

- In Minnesota, carrying, holding, or possessing “a pistol . . . in a public place or public area without first having obtained a permit to carry the pistol” has been a “gross misdemeanor” since 1975. Act of June 4, 1975, ch. 378, § 4, 1975 Minn. Laws 1278, 1281-83.
- California Penal Code Section 171(b) has prohibited the possession of firearms in any state or local public building or at any meeting required to be open to the public, since 1982.
- In 1849, the Supreme Court of Alabama noted that frightening the public by openly carrying a deadly weapon during a fight would be an offense. *O’Neill v. Alabama*, 16 Ala. 65, 1849 WL 407 (Ala., Jan. 1849), cited with approval in *Heller*, 128 S. Ct. at 2817.
- In 1843, the North Carolina Supreme Court recognized that the common law rule against “going armed with unusual and dangerous weapons to the terror of the people” does not violate the state constitutional right to bear arms, even where it is applied to the carrying of commonly used guns in public. *State v. Huntly*, 25 N.C. 418, 422-23 (1843); *see also North Carolina v. Dawson*, 272 N.C. 535, 543-44 (1968) (upholding conviction of individuals carrying pistols).

State courts developed these longstanding prohibitions over hundreds of years through assessment of whether they were reasonable exercises of states’

police powers for the health, safety, or welfare of their citizens. *See, e.g., City of Tucson v. Rineer*, 193 Ariz. 160, 164 (Ct. App. 1998) (upholding ban on gun possession in public parks); *Commonwealth v. Ray*, 218 Pa. Super. 72 (1970), *vacated on other grounds*, 448 Pa. 307 (1972) (upholding ordinance making it unlawful to carry guns on any public property without a license, noting that the right to bear arms was not unlimited); *Township of Chester v. Panicucci*, 62 N.J. 94, 96 (1973) (upholding law prohibiting hunters from possessing loaded guns near any occupied dwelling or playground); *Cole*, 264 Wis.2d at 540 (“relatively deferential” review “appropriate”); *Wisconsin v. Hamdan*, 264 Wis.2d 433, 475 (Wis. 2003) (regulations that do not restrict firearm “possession in homes or businesses do not seem to subvert unduly the self-defense purpose”).

B. Alameda County’s Ordinance Is A Reasonable Regulation

Alameda County’s Ordinance is, by any measure, a reasonable regulation that seeks to protect public safety and does nothing to inhibit the core rights protected by the Second Amendment. The Supreme Court has held that “the Government’s general interest in preventing crime” is “compelling.” *United States v. Salerno*, 481 U.S. 739, 750, 755 (1987) (upholding statute imposing pre-trial detention, explaining that “concern for the safety and indeed the lives of its citizens” is a “primary concern of every government”). The Alameda County Ordinance promotes that interest and is “fair, proper, moderate, suitable under the

circumstances and not excessive.” *Arnold*, 67 Ohio St.3d at 47-48.

In particular, the Alameda Ordinance is tailored to the community’s needs.³ It is a response to the “epidemic” of “gunshot fatalities and injuries” in the County, including a “shooting incident on the Alameda County Fairgrounds that resulted in several gunshot wounds, other injuries and panic.” (Alameda County Code § 9.12.120.) The shooting at the fairgrounds caused panic among the approximately 40,000 people attending the fair at the time. (Def. Answering Br., *Nordyke v. King*, No. 99-1755, 2001 WL 34134747, at *10 (Cal. Mar. 15, 2001).) Despite the presence of 157 police officers and deputy sheriffs, eight fairgoers were shot, including an eight-year-old child, and four were injured in the ensuing panic. (*Id.*) Afterwards, the injured and their families filed nineteen separate tort claims with the County. (*Id.*)

Plaintiffs do not dispute that protecting County citizens is a legitimate state

³ Courts recognize more generally that gun control is for the purpose of public safety. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (The public’s safety “is unquestionably at the core” of the police power, and the local legislature is its “main guardian.”); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (collecting Supreme Court authority). Courts also recognize the “strong interest in [the public] being able to use public areas without fearing for their lives.” *Id.*; *Cole*, 264 Wis.2d at 475 (recognizing the “danger of widespread presence of weapons in public places” and the existence of “police protection against attack in these places”); *Minnesota v. Paige*, 256 N.W.2d 298, 303 (Minn. 1977) (explaining the particular danger of accidentally discharging a weapon in public); *United States v. Dorosan*, No. 08-042, 2008 U.S. Dist. LEXIS 51547, at *13-14 (E.D. La. July 7, 2008) (interpreting *Heller*).

interest. They dispute only whether, in this case, the County’s interest is genuine. (Pl. Supp. Br. at 52-53.) But this kind of second-guessing of the Ordinance’s intent is not allowed, even under a more searching First Amendment analysis. *See United States v. O’Brien*, 391 U.S. 367, 383 (1968).

The County’s response to its undisputed gun violence problem is modest: the Ordinance makes it a misdemeanor for a gun owner who has not been issued a concealed weapons license to bring a gun onto the County’s property.⁴ (Alameda County Code § 9.12.120.) It includes numerous exceptions for peace officers and guards, transporting guns on County roads, sport, and events⁵ so long as the guns are secured to prevent unauthorized use. (Alameda County Code § 9.12.120.F.)

The purely commercial nature of Nordyke’s injury further strengthens the County’s argument that the Ordinance is reasonable as applied to Nordyke. (*See* Def. Supp. Br. 47; ER III, p. 442, Fact No. 18.) Nordyke asks the Court to force the County to do business with him by renting out the County’s fairgrounds for Nordyke’s gun shows. (*See* Pl. Supp. Br. at 47, 51); *see also Mills Music, Inc. v.*

⁴ Nordyke argues that *Heller* “takes . . . off the table” the County’s option of “trying to reduce crime and/or accidents” by regulating firearm possession on County land. (Pl. Supp. Br. at 50.) That is incorrect. As discussed above in Section I.B, the only policy choice *Heller* “took off the table” is “the absolute prohibition of handguns held and used for self-defense in the home.” 128 S. Ct. at 2823.

⁵ The Scottish Caledonian Games satisfies this last exception. (*See* Undisputed Facts 15-18, 32.)

Arizona, 591 F.2d 1278, 1286 (9th Cir. 1979) (recognizing that operating fairgrounds is “essentially a commercial activity”). But as discussed above, the Constitution does not require it.

CONCLUSION

Nordyke seeks recognition of a constitutional right to profit commercially from the sale of guns. That is not the right provided by the Second Amendment under *Heller*, nor the law before the Supreme Court’s decision. Even if there were such a right, the Second Amendment of the Federal Constitution has not been incorporated by the Fourteenth Amendment, and does not apply to state or county regulation. Further, regulation of firearms in public places similar to Alameda County’s Ordinance has been the subject of longstanding prohibitions and recognized by *Heller* as “presumptively lawful.”

Even if the Second Amendment did apply to Alameda County’s Ordinance or the Ordinance fell outside the presumptively lawful categories, it would be valid under the “reasonable regulation” test established by state courts over hundreds of years to assess the validity of regulation of the right to bear arms. The reasonable regulation test fits the guidance *Heller* provides as to the appropriate standard of review, and it conforms with Ninth Circuit law that the right to bear arms is not a fundamental right. The Ordinance satisfies the “reasonable regulation” test

because it addresses the County's unquestionably legitimate government purpose and in no way infringes upon any individual's right to self-defense in the home.

For the reasons discussed above, the *amici* urge this Court to affirm the district court's ruling that the Ordinance is valid.

Dated: October 2, 2008

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SHERIFFS' ASSOCIATION, COALITION TO
STOP GUN VIOLENCE, VIOLENCE POLICY
CENTER, and YOUTH ALIVE! and signing on
behalf of CITY OF OAKLAND, CA and CITY
AND COUNTY OF SAN FRANCISCO, CA

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ATTACHMENT A

ATTACHMENT A — STATEMENTS OF INTEREST OF *AMICI CURIAE*

LEGAL COMMUNITY AGAINST VIOLENCE

Legal Community Against Violence (“LCAV”) is a national law center dedicated to preventing gun violence. Formed by lawyers in the wake of a 1993 assault-weapon massacre at a law firm in San Francisco, LCAV concentrates on state and local policy reform. Among other activities, LCAV provides free legal assistance to counties and municipalities seeking to craft local firearm regulations to fit community needs. As *amicus curiae*, LCAV has provided courts with informed analysis of the legal bases for such local regulations. LCAV has particular interest in and experience with California local gun ordinances.

BRADY CENTER TO PREVENT GUN VIOLENCE

The Brady Center to Prevent Gun Violence (“Brady Center”) is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that federal, state, and local governments can enact the gun laws, regulations, and ordinances they deem necessary to protect communities from gun violence, within constitutional bounds. Through its Legal Action Project, the Brady Center has filed numerous *amicus curiae* briefs in cases involving the constitutionality and interpretation of firearm laws.

**CALIFORNIA PEACE OFFICERS' ASSOCIATION, CALIFORNIA
POLICE CHIEFS' ASSOCIATION, AND CALIFORNIA STATE
SHERIFFS' ASSOCIATION**

California State Sheriffs' Association ("CSSA") represents each of the fifty-eight (58) elected California Sheriffs. California Police Chiefs' Association ("CPCA") represents virtually all of California's Municipal Chiefs of Police. California Peace Officers' Association ("CPOA") represents more than four thousand peace officers, of all rank, throughout the State. The three Associations are interested in this case because the issue presented will have a profound impact on the members of each of the three Associations, as well as every employee under the command of the state's sheriffs and police chiefs. This includes the overwhelming majority of peace officers in the State of California.

The three Associations have identified this matter as one of statewide significance in which their expertise can be of assistance to the Court. This proposed brief offers a perspective of the three Associations as to the issues on appeal, namely the overarching impact of the Court's decision on law enforcement agencies generally and the officers who are potentially subjected to the unlimited and unfettered possession of handguns by individuals in government buildings and/or on government-owned properties. The need for government agencies to reasonably regulate the possession of such weapons in and on public property is of paramount importance for public safety.

CITY OF OAKLAND, CALIFORNIA AND THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA

The City of Oakland, California and the City and County of San Francisco, California, have suffered extensive loss of life, threats to the safety and security of law enforcement personnel, disruption to their economies, and massive health care costs associated with gun violence. Each has developed regulatory programs to address the particular risks and threats posed by gun violence in its community. The cities thus have a critical interest in ensuring that localities retain the flexibility to counter the risks of guns and to protect public safety through reasonable firearm regulations.

COALITION TO STOP GUN VIOLENCE

The Coalition to Stop Gun Violence (CSGV) seeks to secure freedom from gun violence through research, strategic engagement and effective policy advocacy. Our organizational structure is unique among national gun violence prevention organizations. CSGV is comprised of 45 national organizations working to reduce gun violence. Our coalition members include religious organizations, child welfare advocates, public health professionals, and social justice organizations. This diversity of member organizations allows us to reach a wide variety of grassroots constituencies who share our vision of non-violence.

VIOLENCE POLICY CENTER

The Violence Policy Center is a national non-profit organization that engages in research, policy development, and advocacy to prevent firearm-related death and injury in America.

YOUTH ALIVE!

Youth ALIVE! is a non-profit public health agency founded in 1991 and dedicated to preventing youth violence and generating youth leadership in California communities experiencing high rates of violence. Youth ALIVE! advocates for strategies to reduce violence, and runs two programs in Oakland and Los Angeles: (i) CAUGHT IN THE CROSSFIRE, an intervention program that works with youth who are hospitalized due to violent injuries, in order to reduce retaliation, re-injury, and arrest; and (ii) TEENS ON TARGET, a peer leadership and violence prevention program that trains young people from neighborhoods with high rates of violence to provide peer education to middle school students and to become advocates for violence prevention.

Gun violence is a leading killer of young people in this country, but is preventable. The young people of Youth ALIVE! are “urban messengers,” bringing solutions to their peers, the media, policymakers, and the community.

ATTACHMENT B

ATTACHMENT B — ALAMEDA COUNTY FEDERAL FIREARMS LICENSEE LIST

FEDERAL BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES ALAMEDA COUNTY FEDERAL FIREARMS LICENSEE LIST (CLASS 01 DEALERS AND CLASS 02 PAWNBROKERS) NOVEMBER 2007					
License Name	Business Name	Premise Street	City	State	Zip Code
BIG 5 CORP	BIG 5 SPORTING GOODS #135	325 PARK ST	ALAMEDA	CA	945010000
BATH, RAY & MACDONALD, MARTIN	IRVINGTON ARMS	40927 GRIMMER BLVD	FREMONT	CA	94538
YOURISH, DANIEL S	TEDS GUNSHOP	5441 VALLEY PARK AVE	FREMONT	CA	94538
CHAN, FRANKLIN & MACDONALD, MARTIN	IRVINGTON ARMS	40927 GRIMMER BLVD	FREMONT	CA	94538
BIG 5 CORP	BIG 5 SPORTING GOODS #53	3820 MOWRY AVE	FREMONT	CA	945380000
TOWERS, ROY LANGE JR		3069 HORSESHOE CT	HAYWARD	CA	945410000
JARDINE, JOHN G		24800 MISSION BLVD	HAYWARD	CA	945440000
MARTIN, JAMES BLANCO		805 FLETCHER LN STE 1	HAYWARD	CA	945440000
PROFESSIONAL POLICE SUPPLY, INC		3290 ARDEN RD	HAYWARD	CA	94545
FORENSIC ANALYTICAL SPECIALTIES INC	FORENSIC ANALYTICAL	3777 DEPOT RD STE 403	HAYWARD	CA	94545

FEDERAL BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES
ALAMEDA COUNTY FEDERAL FIREARMS LICENSEE LIST
(CLASS 01 DEALERS AND CLASS 02 PAWNBROKERS)
NOVEMBER 2007

License Name	Business Name	Premise Street	City	State	Zip Code
KOBYRD LLC	BULLS EYE III CASTRO VALLEY GUN SHOP	22287 REDWOOD RD	CASTRO VALLEY	CA	94546
MARTIN, WILLIAM EDWARD		3275 HERTLEIN PL	CASTRO VALLEY	CA	94546
CHABOT GUN CLUB INC		9999 REDWOD RD	CASTRO VALLEY	CA	945460000
ANDREOTTI, DAVID VINCENT	ANDREOTTI FIREARMS SALES & SPORTING GOODS	3636 CASTRO VALLEY BLVD #1	CASTRO VALLEY	CA	945460000
J & R SPORTS SUPPLY LLC		2558-B OLD FIRST ST	LIVERMORE	CA	94550
WREDEN, CARTER L	WREDEN'S CUSTOM GUNSTOCKS	1139 INNSBRUCK ST	LIVERMORE	CA	945500000
DOM'S SURPLUS, INC		1870 1ST STREET	LIVERMORE	CA	945500000
JBM INC		5542 BRISA ST #H	LIVERMORE	CA	945500000
AMERICAN OUTDOOR SPORTS SUPPLY, INC		2558 OLD 1ST ST STE B	LIVERMORE	CA	945502097
MILLER, J IVAN		2127 RESEARCH DR #11	LIVERMORE	CA	94551

FEDERAL BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES
ALAMEDA COUNTY FEDERAL FIREARMS LICENSEE LIST
(CLASS 01 DEALERS AND CLASS 02 PAWNBROKERS)
NOVEMBER 2007

License Name	Business Name	Premise Street	City	State	Zip Code
BIG 5 CORP	BIG 5 SPORTING GOODS #160	4514 LAS POSITAS RD	LIVERMORE	CA	94551
DYLER DEVELOPMENT, LLC		5787 PRESTON AVE	LIVERMORE	CA	94551
LAGGER, WAYNE	LPS TACTICAL & PERSONAL SECURITY SUPPLY	34755 POTOMAC RIVER PL	FREMONT	CA	945553235
CHOPRA, DEEPAK C		6600 DUBLIN BLVD	DUBLIN	CA	94568
GRANT, MIKE J	GUN REPAIR UNLIMITED	8035 IGLESIA DR	DUBLIN	CA	945680000
BIG 5 CORP	BIG 5 SPORTING GOODS #239	6750 AMADOR PLAZA RD	DUBLIN	CA	945680000
HAMBY, LARRY W	SECURITY SIX	3001 DAVIS ST	SAN LEANDRO	CA	945772235
BIG 5 CORP	BIG 5 SPORTING GOODS #52	15556 HESPERIAN	SAN LORENZO	CA	945800000
HOWLETT, GEORGE HARRY		746 FOLGER AVE	BERKELEY	CA	947100000
29 Total Class 01 FFLs (Dealers)					

CERTIFICATE OF WORD COUNT

Pursuant to Ninth Circuit Rule 32-1, counsel hereby certifies that the foregoing Supplemental Brief of *Amici Curiae* Legal Community Against Violence *et al.* in Support of Defendants-Appellees Urging Affirmance of the Judgment is produced using 14-point Times New Roman font and contains approximately 5,048 words, including footnotes. Counsel relies on the word count of the computer program used to prepare the brief.

Dated: October 2, 2008

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ASSOCIATION, CALIFORNIA
STATE SHERIFFS' ASSOCIATION,
VIOLENCE POLICY CENTER, and
YOUTH ALIVE!